

# SUPREME COURT UPDATE

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Thank you so much. It was an amazing year for the Supreme Court. I've been a law professor for twenty years now, and I've never seen a Term of the Court that was filled with so many blockbuster decisions in so many different areas of law. From the federalism cases that I talked about yesterday to *Miranda*'s reaffirmation, from grandparents' rights to abortion rights, from campaign finance to aid to parochial schools and school prayer, it was all before the Court this Term.

## I. TERM TRENDS

With the benefit of two days since the Supreme Court adjourned, I've noticed some Term themes. I can start with the obvious. The Ninth Circuit got reversed again, a lot, as did the Fourth Circuit this time.

There were seventy-four decisions this Term by my count.<sup>1</sup> That continues the smaller docket size of the Court. If you look, a decade ago the Supreme Court was averaging over 150 decisions a Term.<sup>2</sup> There were seventy-five decisions last year; this year there were seventy-four.<sup>3</sup> It's obvious that the Court is taking fewer cases. Of this Term's seventy-four cases, again by my count, twenty-one were decided by five-to-four margins.<sup>4</sup> In fourteen of those twenty-one cases, the five in the majority were Rehnquist, O'Connor, Scalia, Kennedy, and Thomas.<sup>5</sup> The four dissenters were Stevens, Souter, Ginsburg, and Breyer.<sup>6</sup> This represents the most classic ideological split of the current Court.

I believe the most important generalization we can draw from this Term is that it teaches us that we must have a much more nuanced account of the Rehnquist Court. The conventional wisdom about the Rehnquist Court is that, overall, it is a conservative court; the five-to-four split I just mentioned is characteristic. Certainly, in some areas the Rehnquist Court continues to be very conservative, and activist conservative. I would point to the federalism cases that I talked about yesterday as examples. Yet, when you look at other decisions—the reaffirming of *Miranda v. Arizona*,<sup>7</sup> the striking down of the partial-birth abortion ban,<sup>8</sup> the invalidation of school prayer<sup>9</sup>—some have been very bitterly disappointing to conservatives. So I think when you see cases that in some ways please conservatives and in other ways

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1. See also Marcia Coyle, *Supreme Court Review: A Small Potent Docket*, NAT'L L.J., Aug 7, 2000, at A1.

2. *The Supreme Court, 1989 Term TABLE 1*, 104 HARV. L. REV. 367 (1990).

3. See also *Statistical Recap of Supreme Court's Workload during Last Three Terms*, [Sup. Ct. Today] 68 U.S.L.W. (BNA) 3069 (July 20, 1999).

4. Thomas C. Goldstein, *Statistics for the Supreme Court's October Term 1999*, [Sup. Ct. Today] 69 U.S.L.W. (BNA) 3076, 3077 (July 18, 2000).

5. *Id.*

6. *Id.*

7. See *Dickerson v. United States*, 530 U.S. 428 (2000) (reaffirming *Miranda v. Arizona*, 384 U.S. 436 (1966)).

8. See *Stenberg v. Carhart*, 530 U.S. 914, 922 (2000) (holding Nebraska's partial birth abortion statute unconstitutional).

9. See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301 (2000) (holding a student-led, pre-football game prayer unconstitutional).

disappoint, it says that the Rehnquist Court isn't going to be looked back at with any simple labels or descriptions.

Yesterday I talked about the federalism cases from the term. Today I want to talk about three other areas: (1) criminal law and procedure, (2) due process and equal protection, and (3) the First Amendment. I'll be honest; I can't even cover all of the important cases in these areas in the forty-five minutes allotted, let alone cover many other areas of important decisions. I've tried to select the cases that I regard as the most significant in the term, especially those cases that might be the most practically important to you.

## II. CRIMINAL LAW AND PROCEDURE

Let me start by talking about the criminal procedure and criminal law decisions of the term. I think one of the truly unique aspects of this term was the very high percentage of cases that criminal defendants won before the Rehnquist Court. I've picked three sub-areas, and, of the seven cases that I've listed, the criminal defendants prevailed in six of them. The only one in which the criminal defendant lost was the first case I listed under the Fourth Amendment—a very important case called *Illinois v. Wardlow*.<sup>10</sup>

### A. Fourth Amendment

The issue in *Wardlow* was whether flight from a police officer was sufficient to create reasonable suspicion to justify a stop.<sup>11</sup> The case has simple facts. An individual was walking down the street in Chicago in what the Court called a high-crime area.<sup>12</sup> He saw four cars driving in caravan fashion. The record is unclear as to whether they were marked or unmarked police cars. The individual apparently thought they were police cars, however, and began running in the opposite direction. A police car pulled over. An officer chased him down, did a stop and a frisk, and found a weapon.

The charge was illegal possession of a weapon, and the individual was convicted. The Illinois Supreme Court ruled that this was an illegal stop, that flight from a police officer is not sufficient to create reasonable suspicion.<sup>13</sup>

As you know, I live in Los Angeles. If you're following the news with regard to the Rampart scandal,<sup>14</sup> and if you live in a city like L.A., you know that if you see a police officer coming, the best thing you can do is run away. But not according to the Supreme Court. In a five-to-four decision, the Court ruled that flight from a police officer in a high-crime area is sufficient to create reasonable suspicion to

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10. 528 U.S. 119 (2000).

11. *See id.* at 122-23, 124 n.2.

12. *See id.* at 121-22. Unless otherwise noted, all facts relating to this case are from *Wardlow*, 528 U.S. at 121-22.

13. *People v. Wardlow*, 701 N.E.2d. 484, 486 (Ill. 1998), *rev'd*, 528 U.S. 119 (2000).

14. This statement refers to the recent disclosure of mass corruption within the ranks of the Los Angeles Police Department Rampart Division. For background information, see Tina Daunt, *Council Looks to Preventing Corruption Rampart: The State Is Asked to Form a Task Force to Study Scandal's Roots and How to Avoid Repetition*, L.A. TIMES, Sept. 27, 2000, at B1. "As a result of the Rampart scandal, more than 100 criminal convictions have been overturned and five LAPD officers have been charged with crimes ranging from planting weapons to attempted murder." *Id.*

justify a stop.<sup>15</sup> This decision was one of the five-to-four splits that I discussed in my introduction.<sup>16</sup>

Chief Justice Rehnquist wrote the opinion for the Court.<sup>17</sup> He said, in terms of a *Terry* stop,<sup>18</sup> reasonableness is to be determined from the totality of the circumstances.<sup>19</sup> Here, given that the flight was from a police officer in a high-crime area, the circumstances were enough to create reasonable suspicion.

I think *Illinois v. Wardlow* raises many questions that some of you, as lawyers, will have to litigate and others of you, as judges, will have to decide. One question left unanswered is, Was there reasonable suspicion to justify the frisk? In *Terry v. Ohio*, the Court ruled that the stop and the frisk have to be independently justified.<sup>20</sup> In a footnote in the majority opinion, Chief Justice Rehnquist said the Court had no occasion to rule on the legitimacy of the frisk because that was not litigated before it.<sup>21</sup>

Furthermore, is it essential that the flight take place in a high-crime area? Or is flight in any area sufficient? In this case, the Court said that the combination of flight in a high-crime area together with suspicion was sufficient.<sup>22</sup> The Court did not say that it was necessary that the location be a high-crime area.<sup>23</sup> If it is not a high-crime area, imagine that the flight from the police takes place in an all-white suburb. Is the Supreme Court going to have a different rule for inner cities as opposed to suburban areas? Is it likely then that the Court will say that flight under any circumstances is enough for reasonable suspicion? And what constitutes "flight"? In this case, the flight is described as running.<sup>24</sup> What about fast walking? You go through all the permutations; those are the issues that you will have to litigate.

The second case that I listed under the Fourth Amendment was, to me, one of the surprises of the Term. The case is *Florida v. J.L.*,<sup>25</sup> and the issue was, Is an anonymous tip with just a physical description of the person stating that the person has a weapon enough to justify reasonable suspicion for a *Terry* stop and frisk?<sup>26</sup>

Again, this case has simple facts. Miami police got an anonymous tip that an African American teenage boy wearing a plaid shirt was standing at a bus stop, and that this teenager was carrying a weapon.<sup>27</sup> Based on the anonymous tip, the police went to the bus stop where they saw an African American teenage male wearing a

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15. *Wardlow*, 528 U.S. at 124-25.

16. See *supra* note 6 and accompanying text.

17. *Wardlow*, 528 U.S. at 121.

18. See *Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (holding that an officer may conduct a brief investigative stop when the officer has reasonable suspicion that a crime has been or is being committed).

19. See *Wardlow*, 528 U.S. 124-25.

20. 392 U.S. at 16-19 (discussing the different requirements for lawful searches and seizures under the Fourth Amendment).

21. See *Wardlow*, 528 U.S. at 124 n.2 (stating that certiorari was granted "solely on the question of whether the initial stop was supported by reasonable suspicion").

22. See *id.* at 124-25.

23. See *id.* The Court stated that the fact that the stop occurred in a high crime area is among the "relevant contextual considerations in a *Terry* analysis." *Id.* at 124.

24. See *id.* at 122.

25. 529 U.S. 266 (2000).

26. See *id.* at 268.

27. See *id.* Unless otherwise noted, all facts related to this case are from *J.L.*, 529 U.S. at 268-69.

plaid shirt. They did a stop and frisk, and they discovered that he did have a weapon. Was this enough for reasonable suspicion? The Supreme Court ruled unanimously that this was not enough to create a reasonable suspicion justifying a *Terry* stop.<sup>28</sup>

Justice Ginsburg wrote the opinion for the Court.<sup>29</sup> She distinguished earlier anonymous-tips cases where there was some basis for corroboration beyond just a physical description.<sup>30</sup> Justice Ginsburg said if a physical description is all that is required, it's too easy for any person to subject another to a search.<sup>31</sup> I could say, for example, that there is an individual wearing a white shirt with a pen in his pocket who has a firearm. If that were enough, then that would give the police the basis for doing a stop and frisk. The Supreme Court said that could not be enough to justify the police stopping someone and using law enforcement authority for a frisk; there must be more.<sup>32</sup>

The government argued that there should be a firearm exception because of the importance of finding out who has concealed weapons.<sup>33</sup> The Supreme Court expressly rejected any blanket exception for firearms,<sup>34</sup> as much as it rejected the idea of a blanket drug exception to the knock and announce rule a few years ago in a case called *Richards v. Wisconsin*.<sup>35</sup>

Justice Ginsburg said that it would be a different situation, perhaps, if the tip was that the person had a bomb rather than just a firearm.<sup>36</sup> It is interesting to wonder why the distinction should matter under Fourth Amendment jurisprudence. Also, she said it would be different in a restricted environment—say a school or an airport.<sup>37</sup>

Consider the following: The police get an anonymous tip that there is a car driving on the freeway that is weaving, and the driver appears to be intoxicated or drug impaired. The police then go out. What is enough to justify the police pulling the car over? Surely if the police see behavior indicative of intoxication, that would be enough. But do the police have to wait until they see the car weaving? Can the police just stop the car based on the anonymous tip? Is driving a car more like being in an airport or a school, bringing it within that exception? Is driving while intoxicated more analogous to a bomb than it is to a firearm? It seems to me that this case is going to be litigated all over the country in light of *Florida v. J.L.*

The final Fourth Amendment case that I have listed is *Bond v. United States*.<sup>38</sup> The facts of this case are really important to understanding the holding. A bus was driving from California through Texas when it was stopped at a routine immigration

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28. *Id.* at 268.

29. *Id.*

30. See *J.L.*, 529 U.S. at 270-71 (distinguishing *Adams v. Williams*, 407 U.S. 143, 146-47 (1972), where a tip came from a known informant, and *Alabama v. White*, 496 U.S. 325, 329 (1990), where an anonymous tip was corroborated by police observation).

31. See *id.* at 272 (saying that "reasonable suspicion . . . requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person").

32. See *id.* at 274.

33. *Id.* at 272.

34. *Id.*

35. 520 U.S. 385, 393-94 (1997).

36. See *J.L.*, 529 U.S. at 273-74.

37. *Id.* at 274.

38. 529 U.S. 334 (2000).

checkpoint in Texas.<sup>39</sup> A border patrol agent got on the bus and checked identification to make sure that the passengers were lawfully in the United States. The officer testified that as he went through the bus he reached into the luggage compartment. If there was soft-sided luggage, he felt it to see if he could detect contraband or weapons. Sure enough, he said he felt a soft-sided suitcase that to his trained touch seemed to contain a brick of drugs. He opened it up and found methamphetamine. The Fifth Circuit said that this was authorized because police officers are allowed to touch luggage.<sup>40</sup> Plain feel, after all, is permissible.<sup>41</sup>

The Supreme Court ruled seven to two that this was a search within the meaning of the Fourth Amendment.<sup>42</sup> Chief Justice Rehnquist wrote the opinion for the Court.<sup>43</sup> The government's argument was that when we travel, we expect that our luggage will be handled; therefore, we have no reasonable expectation of privacy or that the police won't handle our suitcases.<sup>44</sup> Chief Justice Rehnquist expressly rejected this argument. He said we have a reasonable expectation that our luggage will be handled, but we don't expect the police to manipulate it.<sup>45</sup> So according to the Rehnquist opinion, it is okay for the police to touch the luggage, but it is not okay for the police to manipulate the luggage.

Justice Breyer wrote a dissenting opinion, joined by Justice Scalia.<sup>46</sup> Justice Breyer said, "[T]his decision will lead to a constitutional jurisprudence of squeezes."<sup>47</sup> He noted that travel conditions are increasingly hard, and we expect that our luggage will be handled.<sup>48</sup> There is no reasonable expectation of privacy in modern travel. Justice Breyer also pointed out that this ruling really puts key emphasis on the police officer's testimony.<sup>49</sup> If the police officer says, "I just touched the luggage, and as soon as I felt it I detected contraband," that's okay. If the police officer says, "I squeezed or I manipulated the luggage," then that's not okay.

I should say that this is not an unprecedented decision of the Court. In *Minnesota v. Dickerson*, a few years ago, where the police officer did a pat-down search and found drugs, the Supreme Court said if it's plain feel it's okay, but police cannot manipulate the lining of somebody's clothes.<sup>50</sup> *Bond* seems to follow from that holding.

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39. *Id.* at 335. Unless otherwise noted, all facts related to this case are from *Bond*, 529 U.S. at 335-36.

40. *See* *United States v. Bond*, 167 F.3d 225, 227 (5th Cir. 1999), *rev'd*, 529 U.S. 334 (2000).

41. *See* *Minnesota v. Dickerson*, 508 U.S. 366, 375-76 (1993) (interpreting *Terry v. Ohio*, 392 U.S. 1 (1968)).

42. *Bond*, 529 U.S. at 335.

43. *Id.*

44. *See id.* at 337.

45. *See id.* at 338-39.

46. *Id.* at 339.

47. *Bond*, 529 U.S. at 342 (internal quotations omitted).

48. *See id.* at 340.

49. *See id.* at 339 (noting the officer's statements in detail).

50. 508 U.S. 366, 375-76 (1993).

### B. Fifth Amendment

I listed two very important Fifth Amendment cases, both in criminal defense. One case that by now you're all familiar with is *Dickerson v. United States*,<sup>51</sup> in which the Supreme Court affirmed *Miranda v. Arizona*.<sup>52</sup> Unfortunately, many of the press accounts of the case don't explain its procedural posture. In 1968, as part of the Omnibus Crime Control Act, Congress passed a law that said that confessions should be admissible in federal court as long as they are voluntary, even if *Miranda* warnings were not properly administered.<sup>53</sup> As the Supreme Court recognized on Monday, the clear purpose of this law was to overrule *Miranda v. Arizona*.<sup>54</sup>

It is notable that since 1968 the Justice Department has continually refused to invoke this law.<sup>55</sup> None of the subsequent administrations (Nixon, Ford, Reagan, Bush, Carter, and Clinton) have invoked this statute.<sup>56</sup> They have all apparently believed it to be unconstitutional.<sup>57</sup>

Dickerson is an individual who was arrested for bank robbery.<sup>58</sup> After his arrest, he made a statement to FBI agents. His lawyer made a motion to suppress the statement on the grounds that *Miranda* warnings were not properly given. The federal district court suppressed the confession on that basis. The United States Government appealed solely on the issue of whether *Miranda* warnings were properly applied.

A conservative public interest group filed an amicus brief in the Fourth Circuit, arguing that because this federal statute, 18 U.S.C. § 3501, was still on the books, the Fourth Circuit, on its own, should apply the law to admit the confession.<sup>59</sup> The Fourth Circuit did exactly that.<sup>60</sup> Dickerson then appealed to the Supreme Court.

I have questions as to whether or not this issue was correctly raised and was even properly before the Supreme Court. The United States government, with its process of discretion, chose not to raise the statute on appeal.<sup>61</sup> The Fourth Circuit, however, held that this failure did not prevent the court from considering the question on its own,<sup>62</sup> but the Supreme Court did not address that issue. Rather, all nine of the justices focused on the merits, and, in a seven-to-two decision, they declared it unconstitutional.<sup>63</sup>

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51. 530 U.S. 428, 120 S. Ct. 2326 (2000).

52. 384 U.S. 436 (1966).

53. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, Title II, §701(a), 82 Stat. 210 (codified as amended at 18 U.S.C. § 3501 (1994)).

54. See *Dickerson*, 530 U.S. at 436.

55. See *United States v. Dickerson*, 166 F.3d 667, 672 (4th Cir. 1999), *rev'd*, 530 U.S. 428 (2000).

56. See *id.* (citing *Davis v. United States*, 512 U.S. 452, 463-64 (1994)).

57. See *id.* at 671-72 (citing Letter from Janet Reno, Attorney General, to Congress (Sept. 10 1997), asserting that the provision is unconstitutional).

58. *Dickerson*, 530 U.S. at 432. Unless otherwise noted, all facts related to this case are from *Dickerson*, 530 U.S. at 432-33.

59. See *Dickerson*, 166 F.3d at 681 n.14.

60. *Dickerson*, 530 U.S. at 432 (citing 166 F.3d 667).

61. *Dickerson*, 166 F.3d at 681 (noting that the "United States Department of Justice...prohibit[ed] the U.S. Attorney's Office from briefing the issue").

62. *Id.* at 682.

63. *Dickerson*, 530 U.S. at 431.

Chief Justice Rehnquist wrote the opinion for the Court.<sup>64</sup> The Supreme Court, since 1966, has been ambiguous about the constitutional status of *Miranda*. Some cases clearly treat it as a constitutional rule that applies to state governments.<sup>65</sup> On the other hand, there are other Supreme Court cases, especially those carving out exceptions to *Miranda*, that refer to the warnings as “prophylactic,” but not really constitutional.<sup>66</sup> Chief Justice Rehnquist, on Monday, expressly used the phrase “constitutional rule.”<sup>67</sup> He said that *Miranda v. Arizona* was based on the Fifth Amendment.<sup>68</sup> The purpose of section 3501 was to overrule *Miranda v. Arizona*, but it is well established that Congress, by statute, cannot overrule constitutional decisions.<sup>69</sup>

The Supreme Court went on to say that it reaffirmed *Miranda v. Arizona*.<sup>70</sup> The Supreme Court said *Miranda* is now part of the popular culture of teenagers.<sup>71</sup> Even preteens can recite the *Miranda* warnings, a well-established part of police behavior. Therefore, the Supreme Court emphatically reaffirmed *Miranda v. Arizona*.<sup>72</sup>

The next Fifth Amendment case I’ve listed is one that received far less media attention, but from a practical perspective I think it’s very important to those of you who practice criminal law and sit as judges. The case is *United States v. Hubbell*.<sup>73</sup> The issue was, If a person produces documents under a grant of immunity, and the government would not otherwise have known the content of the documents, does the grant of immunity prevent the content of the documents from being used against the person?<sup>74</sup>

Let me make this less abstract by describing the facts. Webster Hubbell—of course, former Associate Attorney General of the United States—was part of further investigations by the Whitewater Special Prosecutor.<sup>75</sup> Hubbell was subpoenaed to testify before a grand jury. He was given a subpoena *duces tecum* that listed categories of documents that he was to produce, but when he came before the grand jury he invoked his Fifth Amendment privilege against self-incrimination.<sup>76</sup>

In *Fisher v. United States*,<sup>77</sup> the Supreme Court made it clear that documents themselves are not testimonial, and people can be forced to produce them.<sup>78</sup> However, if the production would in some way be incriminating—say corroborating ownership of the documents—then the Fifth Amendment would apply.<sup>79</sup> Hubbell

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64. *Id.*

65. *See, e.g., Stansbury v. California*, 511 U.S. 318 (1994) (applying *Miranda* requirements to state police officer).

66. *See, e.g., New York v. Quarles*, 467 U.S. 649, 653 (1984); *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

67. *Dickerson*, 530 U.S. at 437-38.

68. *Id.* at 440.

69. *See id.* at 437 (citing *City of Boerne v. Flores*, 521 U.S. 507, 517-21 (1997)).

70. *See id.* at 443-44.

71. *See id.* at 443 (stating that *Miranda* warnings “have become part of our national culture”).

72. *See id.*

73. 530 U.S. 27 (2000).

74. *See id.* at 30.

75. *See id.* at 30-31.

76. *Id.*

77. 425 U.S. 391 (1976).

78. *See id.* at 409-10.

79. *See Hubbell*, 530 U.S. at 36 n.19.

concluded that, in this instance, for him to produce the documents would be incriminating under *Fisher*; therefore, he invoked his Fifth Amendment privilege against self-incrimination.<sup>80</sup>

The government, pursuant to 18 U.S.C. § 6002, then granted him immunity.<sup>81</sup> The court approved the immunity, and Hubbell produced 13,000 pages of documents pursuant to the grant. Afterward, the government wanted to use the content of the documents against Hubbell. The government said the grant of immunity meant only that it couldn't use the act of production against Hubbell, but it could use the contents of the documents against him.<sup>82</sup> The Supreme Court, in an eight-to-one decision, rejected this argument.<sup>83</sup>

Justice Stevens wrote the opinion for the Court.<sup>84</sup> Justice Rehnquist submitted a dissenting opinion.<sup>85</sup> Justice Stevens emphasized that the government did not know the content of the documents before receiving them and could not reasonably describe what was in the documents.<sup>86</sup> He said that documents, when they are produced under a grant of immunity, are protected by that grant, and the government cannot use the content of the documents.<sup>87</sup> The indictment was quashed.<sup>88</sup>

### C. Sentencing Factor versus Element of the Offense

I have listed a third category of criminal law cases. These are ones that I think are practically important, yet ones that received no media attention. They address the question, What is a sentencing factor as opposed to an element of the offense? The significance of this question lies in the fact that a sentencing factor only has to be proven by a preponderance of the evidence and is decided by the judge,<sup>89</sup> while an element of the offense has to be proven to the jury beyond a reasonable doubt.<sup>90</sup>

In the last couple of years, the Supreme Court has handed down other cases addressing this issue.<sup>91</sup> There are two cases from this term, however, that offer a great deal of clarification. One is statutory, interpreting a federal statute. The other is constitutional. I think both are significant.

The statutory case that I have listed here is *Castillo v. United States*.<sup>92</sup> The case arose out of the Waco incident involving the Branch Davidian religious sect. Individuals were prosecuted for being involved in a conspiracy to kill federal

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80. See *id.* at 31.

81. *Id.* at 31. Unless otherwise noted, all facts relating to this case are from *Hubbell*, 530 U.S. at 31-32.

82. See *id.* at 40-44.

83. *Id.* at 29, 46.

84. *Hubbell*, 530 U.S. at 29.

85. *Id.* at 49.

86. See *id.* at 45-46.

87. See *id.*

88. See *id.* at 46.

89. See *United States v. Watts*, 519 U.S. 148, 156 (1997).

90. See *United States v. Gaudin*, 515 U.S. 506, 522-23 (1995).

91. See *Jones v. United States*, 526 U.S. 227, 232 (1999) (holding that a provision of a carjacking statute that established higher penalties for offenses resulting in serious bodily injury or death set forth additional elements of the offense, not just sentencing considerations); *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998) (holding that a statutory subsection authorizing a sentence of up to twenty years for an alien who illegally returned to the United States after having been deported following a felony conviction was a mere penalty provision and not a separate offense).

92. 530 U.S. 120 (2000).



agents.<sup>93</sup> The federal law at issue in the case deals with crimes of violence. It prescribes a five-year sentence if a firearm is used in the commission of a violent crime and a thirty-year sentence if a machine gun is used.<sup>94</sup> The issue was, Is the part of the statute that provides for a thirty-year sentence for the use of a machine gun to be regarded as a sentencing factor, in which case the judge must determine it by a preponderance of the evidence, or is it an element of the offense, in which case it has to be proven beyond a reasonable doubt to the jury?<sup>95</sup>

The Supreme Court, in an opinion written by Justice Breyer, unanimously found that it was an element of the offense, not a sentencing factor.<sup>96</sup> I want to emphasize that this decision was a statutory interpretation; it was not a constitutional decision. Justice Breyer's opinion stresses the wording of the statute and the way the statute is structured. Justice Breyer said this is not something that is traditionally determined by judges as part of the sentencing, which indicates that it is not a sentencing factor.<sup>97</sup> The Court also emphasized that it would not be difficult to submit this question to the jury along with the other issues.<sup>98</sup> On this basis, the Court found that the statutory provision for a thirty-year sentence for machine gun use was an element of the offense.<sup>99</sup> I think the Supreme Court gives guidance in this case on how to treat many other federal statutes and how to decide whether or not they should be regarded as sentencing factors or elements of the offense.

The constitutional decision is the other case that I have listed here, *Apprendi v. New Jersey*.<sup>100</sup> The facts in the case are very important to understand. An individual fired a gun into a home owned by African Americans.<sup>101</sup> He made a statement, later recanted, that he did it because he didn't want African Americans living in that neighborhood.<sup>102</sup> Under New Jersey law, the penalty for shooting a gun into somebody's home when no one is injured would be a sentence of five to ten years.<sup>103</sup> However, New Jersey, like most states, has a penalty enhancement statute for hate crimes.<sup>104</sup> Pursuant to the penalty enhancement statute, the defendant was sentenced to twelve years in prison.<sup>105</sup>

The issue was, Is the penalty enhancement to be regarded as a sentencing factor, meaning that it must be proven by a preponderance of the evidence and decided by the judge? Or is it an element of the offense, in which case it has to be proven beyond a reasonable doubt and must go to the jury? The Supreme Court, in a five-to-four decision, ruled that the hate crime penalty enhancement is an element of the

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93. See *id.* at 122.

94. See *id.* at 121-122 (quoting 18 U.S.C. § 924(c)(1) (1988 & Supp. V 1993)).

95. See *id.* at 121.

96. *Id.* at 131.

97. See *Castillo*, 530 U.S. at 126.

98. See *id.* at 127 (saying "to ask a jury, rather than a judge, to decide whether a defendant used or carried a machinegun would rarely complicate a trial or risk unfairness").

99. *Id.* at 131.

100. 530 U.S. 466 (2000).

101. *Id.* at 469.

102. See *id.*

103. *Id.* at 470 (construing N.J. STAT. ANN. § 2C:43-6(a)(2)(West 1995)).

104. *Id.* (construing N.J. STAT. ANN. § 2C:44-3(e)(West 1995)).

105. *Id.*

offense, decided under a beyond a reasonable doubt standard by the jury.<sup>106</sup> It is not a sentencing factor.

The decision resulted in a fascinating split of the Court. Justice Stevens wrote the opinion for the Court, joined by Scalia, Thomas, Souter, and Ginsburg.<sup>107</sup> I'm not sure I can find another case decided by the Supreme Court that had that split. Justice Stevens said that when the result of the statute's application would be a punishment greater than the maximum that is provided for the offense—other than because of prior convictions—it has to be regarded as an element of the offense, proven beyond a reasonable doubt, and determined by the jury.<sup>108</sup> In other words, if you are familiar with this area of law, Justice Stevens's concurring opinion in *Jones v. United States*<sup>109</sup> in 1999 has now become the majority position of the Supreme Court.

Justice Stevens emphasized the importance of jury determination.<sup>110</sup> He stressed the significance of proof beyond a reasonable doubt based on *In re Winship*.<sup>111</sup> He talked about the difference in punishment resulting from the application of the law and its harsher penalties.<sup>112</sup> In essence, because the hate crime functions as an independent offense, it has to be proven beyond a reasonable doubt and is a question for the jury.

Justice Breyer wrote a strong dissenting opinion.<sup>113</sup> He stressed the need for "procedural compromises" in deciding what is appropriate for judge and jury respectively to determine.<sup>114</sup> Justice Breyer went through the many kinds of determinations in sentencing that might lead to greater penalties.<sup>115</sup> He raised concerns over how to allocate the judge/jury function in light of the majority opinion that treats penalties greater than the maximum as a separate offense, requiring determination by the jury under a beyond-a-reasonable-doubt standard.<sup>116</sup>

I think this case raises many important questions which are sure to be litigated, and very quickly. For example, does this case articulate a new rule of constitutional law? If so, is it one that can be applied retroactively?

As you know from your practice in this area, under *Teague v. Lane*, the threshold question for habeas corpus is, Is it a new rule?<sup>117</sup> If it is, it's not going to be heard on habeas unless it's one that can be applied retroactively.

Is this a new rule? Judge Lucero<sup>118</sup> asked me this question yesterday, so I went back and read the opinion very carefully. I can't find an answer. There is language

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106. *Id.* at 490.

107. *Id.* at 468.

108. *See id.* at 490.

109. 526 U.S. 227, 252-53 (1999) (arguing that "it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed").

110. *See Apprendi*, 530 U.S. at 476-77.

111. *See id.* (citing *In re Winship*, 397 U.S. 358 (1970)).

112. *See id.* at 477-80.

113. *Id.* at 555.

114. *Id.*

115. *See id. Apprendi*, 530 U.S. at 555-65.

116. *See id.*

117. 489 U.S. 288, 296 (1989).

118. The speaker is referring to Carlos Lucero, Circuit Judge, United States Court of Appeals, Tenth Circuit.

in Justice Stevens's majority opinion that says the results here are "foreshadowed by" our prior ruling, and he cites the Court's opinion in *Jones*.<sup>119</sup>

What about retroactive application? More generally, if this case is retroactively applied, every one of you as a judge is going to be flooded with petitions from prisoners, federal and state, saying, "We were sentenced in a way that didn't take into account that this was an increase that is regarded as an element."

Where do we draw the line? When do we regard the increase in sentence as a separate offense, and when do we regard it as merely a sentencing factor? The Court does not articulate a clear standard here, other than the statement, as the holding, that if there is a penalty greater than the maximum—other than for a prior conviction—it is regarded as a separate offense.<sup>120</sup> This is an enormously important decision.

### III. FOURTEENTH AMENDMENT

Let me shift to the second area that I want to talk about, which concerns due process and equal protection. There are two due process cases and one equal protection case.

#### A. Due Process

The first case that I have listed is *Troxel v. Granville*.<sup>121</sup> The press refers to it as a "grandparents' rights" case.<sup>122</sup> The case had tragic facts. A father with two young daughters committed suicide.<sup>123</sup> For the first year after his death, the mother allowed the girls to regularly visit the paternal grandparents. Then she decided that she was going to largely cut off the visitation between the girls and the grandparents. She did not completely end it, but greatly restricted it. The grandparents then sued under a Washington law that allows any person to petition for visitation and the court to grant visitation if it "may serve the best interests of the child."<sup>124</sup>

The trial court granted the grandparents much more extensive visitation,<sup>125</sup> but the Washington Supreme Court declared the Washington law unconstitutional.<sup>126</sup> The Washington Supreme Court said that parents have a fundamental right to control the upbringing of their children and to expand grandparent visitation in this case, over the mother's objection, was to violate the mother's rights.<sup>127</sup>

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119. *Apprendi*, 530 U.S. at 476 (citing *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

120. *See id.* at 490.

121. 530 U.S. 57 (2000).

122. *See, e.g.*, Shirley M. Sogah, *Court Ruling On Grandparents' Rights Not Wrong*, DENVER POST, June 8, 2000, at B9.

123. *See Troxel*, 530 U.S. at 60. Unless otherwise noted, all facts related to this case are from *Troxel*, 530 U.S. at 60-61.

124. *Id.* at 61 (quoting WASH. REV. CODE § 26.10.160(3) (1994)).

125. *See id.* (noting that the Washington court issued an oral ruling).

126. *In re Custody of Smith*, 969 P.2d 21, 30-31 (Wash. 1998), *aff'd sub nom.*, *Troxel v. Granville*, 530 U.S. 57 (2000).

127. *See id.*

The Supreme Court, without a majority opinion, struck down the Washington law.<sup>128</sup> Justice O'Connor wrote the plurality opinion for four justices.<sup>129</sup> "The Washington non-parental visitation statute is breathtakingly broad,"<sup>130</sup> she wrote, noting that the law allowed any person, at any time, to petition for visitation. She said that the Washington law defined the best interests of the child but didn't require that any deference be given to the parents' choices.<sup>131</sup> The Supreme Court said that in light of the parents' right to control the fundamental upbringing of their children, the Washington law was unconstitutional.<sup>132</sup>

Justice Thomas wrote a fascinating opinion concurring in the judgment, pointing out that no one was asking the Court to reconsider whether or not there should be a fundamental right for parents to control the upbringing of their children under substantive due process.<sup>133</sup> It's clear from Justice Thomas's prior opinions that he doesn't believe in substantive due process or fundamental rights, so long as no one is asking the Court to consider them. He concluded that because this was a fundamental right, the Court would have to use strict scrutiny, and under strict scrutiny, this law should be found to violate the parents' right to control the upbringing of their children.<sup>134</sup>

It was a six-to-three decision invalidating the Washington law without a majority opinion.<sup>135</sup> I think it is possible to read this case very narrowly or much more broadly. The narrow reading says that the Washington-type visitation statute violates the Constitution, but not the grandparent visitation statutes in other states. Every one of the states has a grandparent visitation statute.<sup>136</sup> If you read the decision narrowly, the Court was just invalidating the type of statute that lets a person petition at any time for visitation under a best-interests-of-the-child standard without requiring consideration of the parents' interests. Under a broader reading, the case protects the fundamental right of parents to control the upbringing of their children. Absent evidence of parental abuse or neglect, or some other concrete finding against the parents, it would violate the parents' rights to mandate visitation of which the parents disapprove. Further litigation will have to clarify this decision.

The other due process case that I listed is *Stenberg v. Carhart*,<sup>137</sup> the so-called partial birth abortion case from Wednesday. Nebraska, like thirty-one other states, prohibited a procedure that is called partial birth abortion.<sup>138</sup> The way the statute is written, it prohibits the intentional removal of a fetus from the womb for the purpose of ending the fetus's life.<sup>139</sup>

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128. See *Troxel*, 530 U.S. at 75 (plurality opinion).

129. *Id.* at 60.

130. *Id.* at 67.

131. See *id.*

132. See *id.* at 75.

133. See *Troxel*, 530 U.S. at 80.

134. See *id.*

135. *Id.* at 59.

136. *Id.* at 73 n.\*.

137. 530 U.S. 914, 120 S. Ct. 2597 (2000).

138. *Id.* at 921-22 (citing NEB. REV. STAT. § 28-328(1) (Supp. 1999)).

139. See NEB. REV. STAT. § 28-326(9) (Supp. 1999) (reading in part, "delivering...a living unborn child,...for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child").

I think in order to understand this decision you have to know that the district court made extensive findings of fact as to the effects of this law. The district court found that the law would prohibit a procedure called dilation and evacuation, which is often used for pre-viability abortion procedures.<sup>140</sup> It would also, according to the district court, prohibit the dilation and extraction procedure that is used for abortions in the weeks right before viability.<sup>141</sup> The district court found, as a matter of fact, that these are often the safest procedures for abortion at those stages of pregnancy.<sup>142</sup>

In light of this fact, the Supreme Court, in a five-to-four decision, held the Nebraska law unconstitutional.<sup>143</sup> Justice Breyer wrote the opinion for the Court, joined by Stevens, Souter, Ginsburg, and O'Connor.<sup>144</sup> Rehnquist, Scalia, Thomas, and Kennedy dissented.<sup>145</sup>

Justice Breyer began his opinion by saying that the standard in evaluating government regulation of abortion before viability is whether the government law places an undue burden on the right to abortion.<sup>146</sup>

I want to pause here because that is significant in itself. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>147</sup> in 1992, three justices (O'Connor, Souter, and Kennedy) in a joint opinion said that the undue burden test should be used in evaluating governmental regulation of pre-viability abortion.<sup>148</sup> But that was not a majority opinion. In *Stenberg*, for the first time, five justices in a majority opinion have adopted the undue burden test and applied it to the Nebraska law.<sup>149</sup>

The Court points out that what was involved in this case was the regulation of pre-viability abortions.<sup>150</sup> The Court emphasized that women have the right to pre-viability abortions and that the woman's safety is paramount.<sup>151</sup> Justice Breyer's opinion, which quotes extensively from the fact finding by the federal district court, states that, though it wasn't its intended consequence, the law could prohibit not only the dilation and evacuation procedure, but also the dilation and extraction procedure.<sup>152</sup> In light of the district court's holding that the dilation and extraction procedure is often the safest form of abortion, the Supreme Court found that the law placed an undue burden on a woman's right to pre-viability abortion.<sup>153</sup>

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140. *Carhart v. Stenberg*, 11 F.Supp.2d 1099, 1127 (D. Neb. 1998), *aff'd*, 530 U.S. 914, 120 S. Ct. 2597 (2000).

141. *Id.* at 1122-23.

142. *Id.* at 1132.

143. *Stenberg*, 530 U.S. at 922.

144. *Id.* at 920.

145. *Id.*

146. *Id.*

147. 505 U.S. 833 (1992).

148. *See id.* at 876 (plurality opinion).

149. *See Stenberg*, 530 U.S. at 920.

150. *Id.*

151. *Id.*

152. *See id.* at 939.

153. *See id.* at 945-46.

Justice Thomas wrote an angry dissent accusing the Supreme Court of legitimizing infanticide.<sup>154</sup> Justice Kennedy wrote that under the undue burden test, the Nebraska law should be upheld.<sup>155</sup>

Justice Scalia's fascinating dissenting opinion noted that because dissents are published in order of seniority, his would come before the others. But, he said, "[T]he reader will not comprehend what follows unless he reads [the other dissents] first."<sup>156</sup> He intimated that he did not want any of the other dissenters to be misunderstood.<sup>157</sup> They argued that this case represented an improper application of the undue burden test.<sup>158</sup> Justice Scalia voiced his belief that *Stenberg* is the natural consequence of the undue burden test, showing the undue burden test is wrong.<sup>159</sup>

### B. Equal Protection

The other case I've listed in this category is an equal protection case. From a practical perspective, it is among the most important cases I'll talk about this morning. But my guess is that unless you read the *Supreme Court Reporter Law Week* very carefully, it's a case that probably missed your attention. It got no write-up in the *New York Times* or the *Washington Post* or any local newspaper. The case is *Village of Willowbrook v. Olech*,<sup>160</sup> and the issue was, If a person claims to be discriminated against in a class of one, is there a claim under the Equal Protection Clause?<sup>161</sup>

Here are the facts: A person owns a home in a suburb of Chicago, the Village of Willowbrook.<sup>162</sup> That person applies for an easement to be connected to the city's water and sewer system. The village says, in essence, "We want a thirty-foot easement on your property to connect you." The person says, "You gave everybody else water and sewer connections with a fifteen-foot easement. You're discriminating against me by requiring a thirty-foot easement. Moreover, you are doing this because I successfully sued you earlier, and now you're retaliating." The lawsuit actually named three homeowners as plaintiffs, five individuals in all.<sup>163</sup>

The Supreme Court, in a per curiam opinion, said that there was discrimination, even though the claim was of discrimination against a class of one.<sup>164</sup> In a footnote, the Court said it recognized that there were five plaintiffs, three homeowners in all, but that it didn't matter; even if it's just one person, it's a claim.<sup>165</sup> The Court said equal protection safeguards individuals, not just groups; therefore, even if a single person claims they are discriminated against, it's sufficient.<sup>166</sup> So long as the person

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154. *See id.* at 983 (stating that this procedure "so closely borders on infanticide that 30 States have attempted to ban it").

155. *Id.* at 957.

156. *Id.* at 953.

157. *See id.*

158. *See id.*

159. *See Stenberg*, 530 U.S. at 953-56.

160. 528 U.S. 562 (2000) (per curiam).

161. *Id.* at 564.

162. *Id.* Unless otherwise noted, all facts related to the case are from *Olech*, 528 U.S. at 563-64.

163. *Id.* at 564 n. \*.

164. *Id.* at 564-65.

165. *Olech*, 528 U.S. at 564 n. \*.

166. *See id.* at 564.

claims they were subjected to arbitrary, unjustified treatment, that's enough to state a claim under equal protection.<sup>167</sup>

The per curiam opinion then said that the Court had no need to consider whether retaliation would also be sufficient in itself, because in this case the claim of arbitrary treatment and discrimination was enough.<sup>168</sup> Justice Breyer, however, wrote a concurring opinion saying that he would go along with the Court here only because there were allegations of retaliation and improper motive.<sup>169</sup>

The reason I think the case is so important is that it opens the door to equal protection constitutional challenges to many things that previously have not been dealt with as constitutional rights. Think of the zoning variance that is turned down. Now the disgruntled applicant can say, "I'm discriminated against." Or the person applies for a conditional use permit that is turned down. Different than others? Bring it as an equal protection claim. This was the argument made by the government to the Supreme Court.<sup>170</sup>

Justice Breyer seemed troubled by that argument, but in this case there were allegations of retaliation.<sup>171</sup> Notice that the majority of the Court said allegations of retaliation are not necessary; the claims of arbitrary treatment and unjustified discrimination are sufficient.<sup>172</sup> The case is extremely important.

#### IV. FIRST AMENDMENT

The third and final area that I want to talk about concerns the First Amendment. There were ten First Amendment cases this Term.<sup>173</sup> That's ten out of seventy-four, which is really a very significant part of the docket.

##### A. Speech

Let me talk first about the speech cases and then about the religion cases. There were eight speech cases this Term<sup>174</sup>—five that I want to briefly talk about. The first, *Nixon v. Shrink Missouri Government PAC*,<sup>175</sup> was a campaign finance case. A Missouri statute limited contributions to candidates for public office.<sup>176</sup> The limit for

167. *See id.*

168. *See id.* at 565.

169. *See id.* at 566.

170. *See Olech*, 528 U.S. at 565 (Breyer, J., concurring).

171. *See id.* at 566.

172. *See id.* at 565.

173. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Hill v. Colorado*, 530 U.S. 703 (2000); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999).

174. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000); *Hill v. Colorado*, 530 U.S. 703 (2000); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000); *Los Angeles Police Dep't v. United Reporting Publ'g Corp.*, 528 U.S. 32 (1999).

175. 528 U.S. 377 (2000).

176. *Id.* at 382 (construing MO. REV. STAT. § 130.032 (1994)).

a relatively local office, like the state assembly, was a \$275 contribution.<sup>177</sup> The limit for a statewide office—governor, attorney general, etc.—was \$1,075.<sup>178</sup> The United States Court of Appeals for the Eighth Circuit declared the Missouri statute unconstitutional, saying that limiting contributions for political speech has to meet strict scrutiny, and the government hadn't proven sufficient corruption in Missouri to meet that standard.<sup>179</sup> The Supreme Court, in a six-to-three decision, reversed the Eighth Circuit and upheld the law.<sup>180</sup>

Justice Souter wrote the opinion for the Court.<sup>181</sup> His opinion relied heavily on *Buckley v. Valeo*.<sup>182</sup> In *Buckley*, the Supreme Court said that the government can impose contribution limits because contributions risk corruption or the appearance of corruption, but expenditure limits are unconstitutional.<sup>183</sup> The Supreme Court reaffirmed that distinction.<sup>184</sup> The Supreme Court said a specific level of corruption doesn't have to be proven in order to justify the law.<sup>185</sup> The Court is not going to get into the business of calibrating, in light of inflation, what dollar limits are reasonable and what aren't.<sup>186</sup> The Court reiterated that contribution limits to combat corruption and the appearance of corruption are constitutional, while spending limits are unconstitutional.<sup>187</sup>

I think this case is significant because the Court did not change the law. I also think it is ironic that the case is entitled *Nixon*. Practically, there are many lawsuits pending around the country challenging contribution limits that this ruling will affect. I think these pending cases are all likely to be upheld, except when they challenge small limits. The argument remains that the small size of the contribution unduly interferes with the political process.

The second case that I have listed is another surprise. *Board of Regents of University of Wisconsin System v. Southworth*<sup>188</sup> involved the constitutionality of mandatory student activities fees. Students at every college and university pay a fee each year that subsidizes on-campus activities. A group of conservative law students at the University of Wisconsin Law School challenged the mandatory student activities fee, saying, in essence, "We're being forced to subsidize things we don't believe in and that violates our First Amendment rights."<sup>189</sup> The United States Court of Appeals for the Seventh Circuit found the mandatory student activities fee unconstitutional.<sup>190</sup> The Seventh Circuit analogized this case to union dues and bar

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177. *Id.* at 383.

178. *Id.*

179. *See Shrink Mo. Gov't PAC v. Adams*, 161 F.3d 520, 521-22 (8th Cir. 1998), *rev'd sub nom. Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000).

180. *Nixon*, 528 U.S. at 398.

181. *Id.* at 398.

182. 424 U.S. 1 (1976) (per curiam).

183. *Id.* at 4-5.

184. *See Nixon*, 528 U.S. at 385.

185. *See id.* at 391-92.

186. *See id.* at 396-97 (stating that "cases cannot be truncated to a narrow question about the power of the dollar").

187. *See id.* at 387-88.

188. 529 U.S. 217 (2000).

189. *See id.* at 221.

190. *Southworth v. Grebe*, 151 F.3d 717, 718 (7th Cir. 1998), *rev'd sub nom., Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000).



dues cases, saying it forces people to contribute money to things they don't believe in and violates the First Amendment.<sup>191</sup>

I predicted that this would be a closely divided Court, maybe without a majority opinion. That shows why you wouldn't want me to be your handicapper. The Supreme Court unanimously reversed the circuit and upheld Wisconsin law.<sup>192</sup>

Justice Kennedy wrote the opinion for the Court.<sup>193</sup> He said that mandatory student activities fees are permissible so long as the funds are distributed in a viewpoint-neutral fashion.<sup>194</sup> Justice Kennedy said that in this case the plaintiffs had stipulated that the money was distributed in a viewpoint neutral fashion.<sup>195</sup> Apparently the plaintiffs did that as a strategic choice, because they wanted all mandatory fees invalidated. They didn't want to argue about which ones were viewpoint neutral.

You know what the next generation of litigation-minded students will say, "This isn't viewpoint neutral." It is hard to see how disbursement can be. Does a university have to give as much money to a Nazi group as it does to another group with the same number of students? Distributing money where content-based choices are made was not the issue here. The Court in this case just said that mandatory student activities fees were not unconstitutional.<sup>196</sup>

The third case I've listed is *City of Erie v. Pap's A.M.*<sup>197</sup> This case will be very important for those of you who practice local government law and certainly for those of you who sit in trial courts. *Erie* involved the constitutionality of a city ordinance that proscribed public nudity.<sup>198</sup> The ordinance had been adopted to close down a nude-dancing establishment.<sup>199</sup>

In 1991, in *Barnes v. Glen Theatre, Inc.*,<sup>200</sup> the Supreme Court upheld the application of Indiana's public nudity law to close down the Kitty Cat Lounge.<sup>201</sup> Many thought that the Court got to the bare facts—the naked truth—but there was no majority opinion for the Supreme Court in that case.

The Erie council adopted the nudity law with the goal of shutting down the Kandyland nude-dancing establishment.<sup>202</sup> The Pennsylvania Supreme Court said, reading *Barnes* (not a majority opinion), that the Erie ordinance was unconstitutional.<sup>203</sup> While the case was pending, Kandyland closed down,<sup>204</sup> so the Supreme Court seemed likely to dismiss the case as moot. Maybe the justices wanted to see the pictures and then dismiss the case as moot. However, the Supreme

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191. *Id.* at 731 (analogizing to *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991) and *Keller v. State Bar of Cal.*, 496 U.S. 1 (1990)).

192. *Southworth*, 529 U.S. at 221.

193. *Id.* at 220.

194. *Id.* at 221.

195. *Id.* at 234.

196. *Id.* at 221.

197. 529 U.S. 277 (2000).

198. *Id.* at 282-83 (citing *Erie, Pa.*, Ordinance 75-1994 (Sept. 28 1994)).

199. *See id.* at 290-92.

200. 501 U.S. 560 (1991).

201. *See id.* at 563 (plurality opinion).

202. *See Erie*, 529 U.S. at 290-92.

203. *Pap's A.M. v. City of Erie*, 719 A.2d 273, 277 (Pa. 1998), *rev'd*, 529 U.S. 277 (2000).

204. *Erie*, 529 U.S. at 287.

Court, in a plurality opinion written by Justice O'Connor, said that since the company still had the license for the business, it might reopen the club.<sup>205</sup> That meant the case was not moot. The Supreme Court, in a six-to-three decision without a majority opinion, upheld the City of Erie's public nudity law.<sup>206</sup>

Justice O'Connor wrote for a plurality of the Court.<sup>207</sup> She said that nude dancing is not speech, but it is conduct that communicates, and conduct that communicates is essentially subjected to heightened scrutiny.<sup>208</sup> The government here had an important interest in preventing the undesirable secondary effect that comes from nude dancing—crime, prostitution, and the like that occurs outside the nude-dancing establishments.

The problem with this argument was, as Justice Souter pointed out in the dissent, that there is nothing in the record to document that the nude-dancing club caused these offenses.<sup>209</sup> Justice O'Connor addressed that argument, saying there didn't have to be.<sup>210</sup> She said the local legislators could draw from their personal experience, observing what went on outside, not inside.<sup>211</sup>

Justice Stevens, however, made what I think is a very important point when he said that the law allows dancers with pasties and G-strings, but it does not allow complete nudity.<sup>212</sup> There is no evidence to show that dancers with pasties and G-strings cause less crime than completely nude dancers, and isn't that really what has to be proven?<sup>213</sup> I think the greatest thing we see in the case is the Court's willingness to uphold the law, even without any proof.

Justices Scalia and Thomas concurred in the judgment.<sup>214</sup> They said that the First Amendment can't be used to challenge neutral laws of general application.<sup>215</sup> They tried to take the standards that the Court has adopted—the free-access laws—and apply them to speech.<sup>216</sup>

The fourth case that I've listed here is *Hill v. Colorado*.<sup>217</sup> It involved a Colorado law that prohibits going within eight feet of a person for purposes of leafleting, holding up a protest sign, education, or counseling within 100 feet of a reproductive health care facility.<sup>218</sup> The obvious purpose of the law was to stop the so-called "sidewalk counselors" outside abortion clinics.

The Supreme Court on Wednesday, in a six-to-three decision, upheld the Colorado law as constitutional.<sup>219</sup> The Supreme Court invoked traditional First Amendment principles with regard to legislating speech on public sidewalks and in

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205. *Id.* at 287-88.

206. *Id.* at 283.

207. *Id.* at 282.

208. *See id.* at 289-90.

209. *Erie*, 529 U.S. at 313-14.

210. *See id.* at 296-98.

211. *See id.* at 298 (saying that "city council members, familiar with commercial downtown Erie, . . . can make particularized, expert judgments about the resulting harmful secondary effects").

212. *See id.* at 318 (Stevens, J., dissenting).

213. *See id.* at 318-19.

214. *See Erie*, 529 U.S. at 302 (Scalia, J., concurring in the judgment).

215. *See id.* at 307-09.

216. *See id.*

217. 530 U.S. 703 (2000).

218. *Id.* at 707 (construing COLO. REV. STAT. § 18-9-122(3) (1999)).

219. *Id.* at 714.

public places. The Court said that the Colorado law is content, subject matter, and viewpoint neutral.<sup>220</sup> It prevents going up to a person—whether you express pro- or anti-abortion messages, or any other subject matter—if it is for protest, education, counseling, leafleting, or holding up signs.<sup>221</sup> The Court said that the government can regulate speech in public forums if it is content neutral.<sup>222</sup> If the government has a time, place, and manner restriction that serves an important government interest, and there is an alternative place for speech, then it is really a place restriction.<sup>223</sup> The Court said that the restrictions on going within eight feet of a person within a hundred feet of a clinic are important in order to protect entrance to and exit from the facility.<sup>224</sup> The Court said that restrictions have to be narrowly tailored, and, because the Colorado law's restrictions are narrowly tailored, it is constitutional.<sup>225</sup>

The final speech case that I've listed, also from Wednesday, is *Boy Scouts of America v. Dale*.<sup>226</sup> New Jersey, like almost every state, has a law prohibiting discrimination by business establishments and places of public accommodation based on race, gender, religion, or sexual orientation.<sup>227</sup> James Dale was a life-long Boy Scout from the age of eight who became an assistant scout leader as a young adult.<sup>228</sup> While a student at Rutgers University, he gave a speech advocating gay rights in which he declared that he was gay. Officials of the Boy Scouts saw press coverage of the speech and sent Dale a letter saying that since he had identified himself as gay, he was no longer allowed to be an assistant scout leader. He sued under New Jersey's public accommodation statute.

The Boy Scouts defended on their First Amendment rights and freedom of association.<sup>229</sup> The New Jersey Supreme Court ruled in favor of Dale and against the Boy Scouts.<sup>230</sup> On Wednesday, in a five-to-four decision, the Supreme Court ruled in favor of the Boy Scouts and reversed the New Jersey Supreme Court.<sup>231</sup>

Chief Justice Rehnquist wrote the opinion for the Court, joined by O'Connor, Scalia, Kennedy, and Thomas.<sup>232</sup> The key precedent here that both the majority and the dissent argued about was a case called *Roberts v. United States Jaycees*.<sup>233</sup> It involved the Minnesota Human Rights Act,<sup>234</sup> and whether that act could be applied to stop the Jaycees from discriminating based on gender.<sup>235</sup> In that case, the Supreme

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220. *Id.* at 723-24.

221. *Hill*, 530 U.S. at 723.

222. *Id.* at 719.

223. *Id.* at 723.

224. *See id.* at 728-29.

225. *See id.* at 731.

226. 530 U.S. 640, 120 S. Ct. 2446 (2000).

227. N.J. STAT. ANN. §§ 10:5-4 and 10:5-5 (West Supp. 2000).

228. *Boy Scouts*, 530 U.S. at 644. Unless otherwise noted, all facts relating to this case are from *Boy Scouts*, 530 U.S. at \_\_\_, 120 S. Ct. at 2449-50.

229. *See id.* at 645-46.

230. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1219 (N.J. 1999), *rev'd*, 530 U.S. 640 (2000).

231. *Boy Scouts*, 530 U.S. at 644.

232. *Id.*

233. 468 U.S. 609 (1984).

234. MINN. STAT. ANN. §§ 363.01-.20 (West 1991 & Supp. 2001).

235. *Roberts*, 468 U.S. at 612.

Court said that the government had a "compelling interest in eradicating discrimination against its female citizens" that overrides freedom of association.<sup>236</sup>

There are two exceptions to freedom of association that protect the right to discriminate. One is what the Court might call intimate association.<sup>237</sup> My mental model of an intimate association is a small dinner party; somebody not invited sues. Freedom of association protects the right to exclude the non-invitee. The other exception exists where discrimination is integral to the express activity of the group.<sup>238</sup> My mental model here has been that the Ku Klux Klan can exclude African Americans, as can the Nazi party, because discrimination is integral to the expressive message of those groups.

The issue in *Boy Scouts* was whether discrimination against gays is integral to the expressive message of the Boy Scouts.<sup>239</sup> In his majority opinion, Chief Justice Rehnquist accepted the Boy Scouts' argument.<sup>240</sup> He pointed to some language in Boy Scouts manuals saying Boy Scouts are supposed to be morally straight; they are supposed to be clean of mind, and the like.<sup>241</sup> But, most of all, he said the Boy Scouts should be able to define their own expressiveness.<sup>242</sup> Being anti-gay should be okay if they define it that way. That is the significance of the case.

Justice Stevens wrote a long dissent.<sup>243</sup> He discussed the Boy Scouts' materials in detail, finding that there was nothing in them that indicated that Boy Scouts have as a key expressive message to be anti-gay.<sup>244</sup> The concern, he said, is that if any group can define its expressive message for itself, and can do so in litigation, then why can't any group that wants to discriminate say, "It's our expressive message"?<sup>245</sup> Why can't the Jaycees say, "Our expressive message is discriminating against women," and be able to discriminate in that way? The key difference between the majority and the dissent is the question of how to decide what the expressive message of the group is. Does the group define itself by litigation?

### B. Religion

I want to quickly discuss two religion cases, both quite important. The first is *Santa Fe Independent School District v. Doe*.<sup>246</sup> It involved the constitutionality of prayers at football games.<sup>247</sup>

I think your ability to understand this case depends on where in the country you live. I grew up on the south side of Chicago, and I've lived in Los Angeles. It's hard

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236. *Id.* at 623.

237. *See id.* at 617 (referring to "intimate human relationships").

238. *See id.* at 622 (noting the importance of "shielding dissident expression from suppression by the majority").

239. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000).

240. *See id.* at 651-56.

241. *See id.* at 651.

242. *See id.*

243. *Id.* at 663-700.

244. *See Boy Scouts*, 580 U.S. at 666-69.

245. *See id.* at 666-69.

246. 530 U.S. 290 (2000).

247. *Id.* at 294.

for me to understand the cultural significance of high school football games in certain parts of the country. This case comes out of southern Texas.<sup>248</sup>

The case has a long procedural history. For much of the procedural history, the students at Santa Fe High School would hold an election every year to elect a student to deliver an inspirational message before each varsity football game.<sup>249</sup> The content of the message, it turns out, regularly involved delivering a prayer. It was supposed to be a nonsectarian prayer, but in reality it was quite expressly a Christian prayer. The question was, Is this constitutional? The Supreme Court, in a six-to-three decision, declared that the pre-game prayer violated the Establishment Clause.<sup>250</sup>

Justice Stevens wrote the opinion for the Court.<sup>251</sup> He emphasized that the government, by allowing this student-led prayer, was creating the forum for the activity.<sup>252</sup> The government was participating in bringing the prayer to the event through the election of the student and was involved in every way in the prayer occurring.<sup>253</sup> Based on all of the school prayer cases, the Supreme Court said that this was unconstitutional.<sup>254</sup>

I just want to point out some things that are significant about this case. In the last five to ten years, conservatives have often tried to recapture and refocus traditional issues as free speech, issues usually litigated under the Establishment Clause. In this case, proponents of the student-led prayer argued that students should be able to say whatever they want before football games; to prevent prayer would be to discriminate against private religious speech, which the First Amendment prohibits.<sup>255</sup>

I think it's quite significant that the Supreme Court rejected that argument. The Court said that the football game was not a public forum; therefore students could not say whatever they wanted.<sup>256</sup> The question left open by this ruling is, If there are going to be subject matter restrictions, is it constitutional to exclude religious messages?

I think the other way the case is significant is that the Court makes no choice between the competing theories in the Establishment Clause. The current Court, I think, is quite divided on that. Should it be a straight separationist, pro-endorsement, or coercion approach?

What I found interesting in Justice Stevens's opinion is that he used all of those theories, and he said that they were all violated.<sup>257</sup> He said the government was bringing prayer into government programs and events.<sup>258</sup> That violated strict

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248. See *id.* The text reads, "a small community in the southern part of the State." *Id.*

249. *Id.* at 294. Unless otherwise noted, all facts relating to this case are from *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 294-98.

250. *Id.* at 301.

251. *Doe*, 530 U.S. at 294.

252. See *id.* at 302-03.

253. See *id.* at 304-07.

254. *Id.* at 317.

255. See *id.* at 302 (quoting *Bd. of Educ. of Westside Comty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990)).

256. See *Doe*, 530 U.S. at 302-03.

257. See *id.* at 301-15.

258. See *id.* at 301-07.

separation because it appeared to be government endorsement of religion.<sup>259</sup> There is a lot of pressure on students to be in football games in these communities; that's coercion, he said.<sup>260</sup> The case is quite significant for these reasons, as is the six-to-three decision excluding prayer at football games.

The final case is a case that also came down on Wednesday, *Mitchell v. Helms*.<sup>261</sup> The issue was the constitutionality of government aid to parochial schools; specifically, Can the government give instructional equipment, like audio-visual equipment or computers, to parochial schools?<sup>262</sup>

In two cases in the 1970s, *Wolman v. Walter*<sup>263</sup> and *Meek v. Pittenger*,<sup>264</sup> the Supreme Court held that the government could not give instructional equipment to parochial schools.<sup>265</sup> The Court said that the instructional equipment might be used for religious instruction, and any government aid would be advancing religious instruction.<sup>266</sup> The *Mitchell* case involved the distribution of computers and instructional equipment to Louisiana parochial schools.<sup>267</sup>

In a six-to-three decision without a majority opinion, the Supreme Court held that the government may give instructional equipment to parochial schools.<sup>268</sup> The six justices in the majority all agreed that *Wolman v. Walter* and *Meek v. Pittenger* are overruled.<sup>269</sup> That's about all the six justices in the majority agreed to.

In order to understand the justices' disagreement, I need to give a little bit of background. In the mid 1980s, in a case called *Aguilar v. Felton*,<sup>270</sup> the Supreme Court held that public school remedial education teachers couldn't provide instruction on parochial school premises because it would violate the Establishment Clause.<sup>271</sup>

In 1997, in *Agostini v. Felton*, the Supreme Court five to four overruled *Aguilar*.<sup>272</sup> Justice O'Connor wrote the majority opinion.<sup>273</sup> At the end she said, "To summarize," we find violations of the Establishment Clause in three circumstances: if the government is participating in religious indoctrination; if the government is not neutral and it is favoring some religions over others; and, finally, if the government is excessively entangled in the administration of programs.<sup>274</sup> It is interesting that she labeled that as "summarizing," because it really was not the summary at all. It was quite a different test than the Court had ever adopted.<sup>275</sup>

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259. *See id.*

260. *See id.* at 311-12.

261. 530 U.S. 793 (2000).

262. *Id.* at 801.

263. 433 U.S. 229 (1977), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

264. 421 U.S. 349 (1975), *overruled by Mitchell v. Helms*, 530 U.S. 793 (2000).

265. *See Mitchell*, 530 U.S. at 803.

266. *See Wolman*, 433 U.S. at 249-51; *Meek*, 421 U.S. at 366.

267. *See Mitchell*, 530 U.S. at 802-03.

268. *See id.* at 801.

269. *Id.* at 808, 837.

270. 473 U.S. 402 (1985), *overruled by Agostini v. Felton*, 521 U.S. 203 (1997).

271. *Id.* at 413-14.

272. 521 U.S. 203, 209 (1997).

273. *Id.* at 207.

274. *Id.* at 234.

275. This test modified the three-part test articulated in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

In the case decided on Wednesday, *Mitchell v. Helms*, Justice Thomas wrote for a plurality of the Court, joined by Rehnquist, Scalia, and Kennedy.<sup>276</sup> Thomas said that the *Agostini* approach of Justice O'Connor is the test for the Establishment Clause<sup>277</sup> and that the government should be able to give aid to religious schools so long as it does not favor some religions over others.<sup>278</sup> Justice Thomas then said that it is permissible for the government to give aid to parochial schools, even if that aid is used for religious instruction.<sup>279</sup>

Justice O'Connor wrote an opinion concurring, joined by Justice Breyer.<sup>280</sup> She said the Thomas approach is unprecedented in allowing parochial schools aid.<sup>281</sup> It takes as the school test the government-neutral-among-religions standard.<sup>282</sup> That has never been the approach of the Court.<sup>283</sup> O'Connor said that for her, the basic rule is government aid can't be used for religious instruction.<sup>284</sup> Three justices dissented.<sup>285</sup>

What about the next issue that is going to come up: school vouchers? We know that four justices will clearly allow vouchers, even if the money goes to religious instruction.<sup>286</sup> What about Justices O'Connor and Breyer? If the voucher money goes for religious instruction, would it violate the test they announced on Wednesday, or will they draw a distinction?

Even though I have gone over my allotted time, I have still only covered some of the cases. There were so many of significance in this term, and already many potential blockbusters are on the docket for next year (revival of the non-delegation doctrine, drug testing for pregnant women, roadblocks, etc.). Law professors will have plenty to write about for years to come, and if you're kind enough to invite me back, I'll talk about those too.

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276. 530 U.S. 793, 801 (2000).

277. *Id.* at 807-08.

278. *See id.* at 809.

279. *Id.* at 820.

280. *Id.* at 286.

281. *Mitchell*, 530 U.S. at 836.

282. *See id.* at 836-38.

283. *See id.* at 837-38.

284. *See id.* at 840.

285. Justices Souter, Stevens, and Ginsburg dissented. *Id.* at 867.

286. These four are Justices Thomas, Rehnquist, Scalia, and Kennedy. *See id.* at *Mitchell*, 530 U.S. at 809-810.

